

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1139

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BENJAMIN MALLAH,

Defendant-Appellant.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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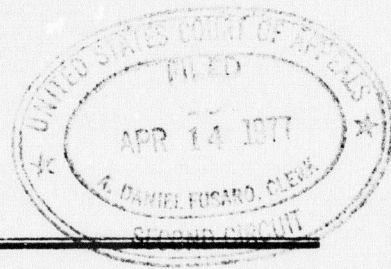


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77 - 1162

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

BENJAMIN MALLAH,

Defendant-Appellant.

BRIEF FOR APPELLANT
BENJAMIN MALLAH

Preliminary Statement

Appellant Benjamin Mallah appeals from an order entered in the United States District Court for the Southern District of New York by the Hon. Milton J. Pollack, denying his motion pursuant to Rule 33, F.R.C.P. for a new trial without an evidentiary hearing and, alternatively, for relief pursuant to Title 28, United States Code, Section 2255. The order appealed from was entered on February 24th, 1977.

The conviction underlying the instant proceeding was entered on February 26th, 1974. After trial to jury, appellant was convicted of one count of violating Title 21, United States

Code, Section 846. As a result of this conviction, appellant was sentenced to the custody of the Attorney General, or his duly authorized representative, for a period of ten (10) years. In addition, a Special Parole Provision of three (3) years was imposed, together with a \$25,000 fine. Appellant's conviction was affirmed by this Court in United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974) and a petition to the United States Supreme Court for a writ of certiorari was denied, 420 U.S. 995 (1975).

STATEMENT OF THE FACTS

This appeal marks the third time that Benjamin Mallah has sought relief in this Court. On direct appeal, his conviction was affirmed, 503 F.2d 971 (1974). An earlier bid for collateral relief pursuant to Title 28, United States Code, Section 2255 was denied by Judge Pollack and this Court affirmed on the district court's opinion (February 7th, 1977).* On January 10th, 1977, Mallah moved in the district court pursuant to Rule 33, F.R.C.P. for a new trial on the ground that a key government witness had committed perjury at the original trial and that the government knew or should have known that the witness' testimony was false. Subsequent to filing its answer in the district court, the government wrote

*Docket No. 76-2145

a letter to Judge Pollack claiming that appellant's Rule 33 motion was untimely since slightly more than two years had passed since the issuance of this Court's mandate on the direct appeal. In response, appellant, inter alia, requested that the district court alternatively treat the motion as an application pursuant to Title 28, United States Code, Section 2255. As noted in the preliminary statement, on February 24th, 1977, Judge Pollack denied Mallah's motion and this appeal follows.

The procedural history of this case is important because the facts presented cannot be decided, or indeed fairly analyzed, in a vacuum. These facts gain significance when considered in the context of the points raised on direct appeal and in the earlier 2255 motion. From the inception of the post-conviction applications for relief, Mallah's contention has been that despite the number of witnesses, this case, where the issue was whether Mallah was an integral part of a narcotics conspiracy, was a close one.* The first 2255 petition alleged that a central government witness, Cecile Mileto, had committed perjury during the trial and that agents of the government knew her testimony to be false. This factual claim was made on the basis of evidence discovered after trial which appeared in the form of interviews

*On direct appeal, appellant raised the issue of sufficiency of the evidence.

with the author of a book about Mrs. Mileto's life.* The district court held that Mallah's showing on this motion was insufficient to warrant a hearing or any other relief and this Court, as noted, affirmed.

Less than three months after Judge Pollack denied the first 2255 motion, appellant went back to the district court with a rather serious claim that another key government witness, Joseph Conforti, had committed perjury and, again, that the government knew or should have known that the testimony was false. Once again, Judge Pollack rendered a careful and studied opinion setting forth several reasons why the moving papers did not entitle Mallah to the relief requested but, it is respectfully submitted, ignoring the larger question of whether Mallah had been convicted on the basis of perjured testimony.

While the facts of this case have been repeatedly set forth in the multitude of briefs and opinions, for purposes of context, a brief description of the facts which are relevant to this proceeding will follow. The theory of the government's case at trial was that Benjamin Mallah served as financier of the now infamous Herbert Sperling drug operation.** The government's proof focused on the frequent transfer

*Louie's Widow, Cecile Mileto with Dave Fisher, Playboy Press, 1975.

**United States v. Sperling, 506 F.2d 1323 (2nd Cir., 1974).

of large sums of money between Mallah and Sperling. This was not a case, however, where the defense rested on the alleged infirmities of the government's presentation. The defense established that Mallah was a well-known bookmaker with a diversified array of clients. (T 1323 - 1349)*

Testifying in his own behalf, Mallah acknowledge that as a bookmaker, he had taken bets in the Seventh Avenue vicinity for at least 25 years. (T 1366) Mallah testified that he had known Herbert Sperling for approximately three or four years, having met him in the vicinity of Seventh Avenue and engaged in gambling activities with him. (T 1368 - 1369)

Defendant-witness flatly denied any involvement with the sale or distribution of narcotics. (T 1368)

As stated above, appellant's position is that when the gloss is stripped away, the case against him was a close one. It is quite true that many witnesses placed Mallah in association with Sperling. However, there was very little non-hearsay evidence which connected Mallah to the drug trade. In fact, three substantive counts charging Mallah with violations of the narcotics laws, were dismissed at the end of the government's case on the grounds of insufficient proof. In his final instructions to the jury, Judge Pollack stated that:

*The letter "T" refers to the trial transcript.

"There is no evidence in the record to support a statement that Mallah transacted business in cocaine or heroin in the sense of dealing with the drug. The contention here is that he was the money-man or backer, as you have heard it."
(T 1726 - 1727)

Joseph Conforti was one of the principal witnesses against appellant Mallah. Conforti was introduced to the narcotics business by Cecile Mileto's husband, Louis. (T 647ff) In June or July of 1971, Mileto, according to Conforti, stored items kept in boxes and suitcases on the premises of Conforti's gasoline station. (T 648) Later, Conforti discovered that these packages contained sundry items attendant to the narcotics business, including manitta and milk sugar which served as dilutants. (T 649) Describing his business, Mileto told Conforti that he worked for Herbert Sperling. (T 650) Thereafter, Conforti's direct involvement began with a trip to Philadelphia with Louis Mileto to deliver a kilo of heroin. (T 652) In Camden, New Jersey, Conforti observed Mileto deliver a package and receive what was purported to be \$60,000 in cash. (T 652) When asked whether the money was going to "Herbie", Mileto stated that it was going to "Benny", Herbie's "partner for money." (T 653) Thereafter, the bills were exchanged for larger denominations and Conforti accompanied Mileto with the package of money to Sperling's Spring Street apartment. (T 655) Some fifteen to twenty minutes later, the witness allegedly observed appellant Mallah leaving 5 Spring Street

with a box that had contained the money. (T 655)

As the months wore on, Conforti became increasingly more involved in the narcotics business. In August, 1971, the boxes and suitcases stored at the gasoline station were transferred to an apartment that Mileto had in Queens and to Conforti's home. (T 658 - 660) Foreseeing the possibility of Mileto being arrested, Conforti was introduced to Sperling whom he was directed to contact in the event that Mileto became unavailable. (T 660 - 661) The meeting with Sperling was at Ballantine's Barbershop. (T 661) Subsequently, Conforti made several deliveries of packages which contained the dilutant. (T 662ff)

The problems created by Mileto's arrest were dramatized at a meeting in the Sperling apartment at Spring Street. Conforti testified that in the presence of the appellant Mallah, Sperling was chastising Mileto for his conduct. (T 700) After "yelling" at Mileto, Sperling turned to Mallah and said, "I told you so." In reply, Mallah is alleged to have stated, "What could you do?" (T 700 - 701)

In March of 1972, Conforti, according to his testimony, became a part of Sperling's narcotics operation. (T 702) Conforti's duties included mixing heroin in various rented hotel rooms. (T 702ff) At this time, Conforti also described the alleged participation of the defendant Barney Barrett. (T 713 - 716) In the Stage Delicatessen on Seventh Avenue, Conforti was alleged to have had a conversation with

Barrett concerning dilutant in the appellant Mallah's presence. (T 717) Finally, Conforti's participation ended with his arrest at which time dilutant and mixing materials were seized. (T 743)

In an attempt to impeach Conforti's credibility, defense counsel forged well beyond the now pedestrian tact of demonstrating that the witness had lied in an effort to gain lenient treatment. In this case, defense counsel was armed, as this Court will remember, with a tape-recorded conversation between Conforti and Samuel Kaplan, wherein Conforti allegedly, on behalf of co-conspirator Jack Spada, was attempting to extort a sum of money from Kaplan to keep Kaplan "out of the case." (T 779 - 780) See discussion generally in United States v. Mallah, 503 F.2d at 976-77.

When questioned about this extortive act, Conforti gave the following explanation:

"On Herbert Sperling's case, I saw Jack Spada. I called him up, told him to give himself up. When I was working for Herbert, I made a delivery, Sam Kaplan had an operation on his stomach, I think I delivered a kilo and a half of heroin with Jack. Jack told me to contact Sammy and for \$10,000, he would keep his mouth shut because I didn't testify about Herbie on Sperling's case and that if - tell Sammy that - if I don't get in touch with him, he knows that I am a government witness, and that if he spoke, naturally, the government would speak to me and I would tell them that I have delivered a kilo and a half of heroin with Jack at his hospital bed. There was two cousins of his that lived in Brooklyn that were there when I made

the delivery. Jack was waiting on the level - in other words, he was with me when I made the delivery. So Jack says, if you don't contact him, he's going to tell the government, be with the government and when he tells the government, they will tell me, Joe, did you make the delivery so Sam Kaplan. Naturally, I will tell them yes. So he told me to call up Sam Kaplan, tell him he wanted \$10,000 to keep his mouth shut." (T 779 - 780; emphasis supplied)

Again, during cross-examination by co-counsel, Conforti testified about the delivery Jack Spada made to Sam Kaplan. (T 875)

This testimony, apparently unexpected, revealed yet another heroin transaction within the framework of the alleged Sperling-Mallah conspiracy. After all, it was Sperling and his alleged money partner Mallah who were supplying the heroin. Government counsel, in summation, spent a great deal of effort convincing the jury that Conforti was worthy of belief.

"If he was lying, and his main concern was his sentence, he would have said, he would have lied about that. He would have denied it, but he didn't. He told you things that didn't come out. He told you that he made a delivery of a kilo and a half to Kaplan which he never told anybody about in the government until he sat there in that witness stand. A kilo and a half of heroin he delivered to Kaplan.

It was an interesting point. Someone asking on page 287, 'Do you know when you spoke to that agent, that Mr. Mileto had delivered narcotics to a hospital, to Mr. Kaplan?'

Mr. Conforti answered, 'I delivered the narcotics. Not Mr. Mileto, I delivered them.' " (T 1606 - 1607)

* * *

"Recall Mr. Conforti. Was he hiding anything? He told you things that no one knew. He told you about the delivery of a kilo and a half which he could be indicted for." (T 1609)

In December of 1976, the government proceeded to trial against other participants in essentially the same conspiracy. United States v. De Saverio, S.D.N.Y., No. S 76 CR 195 (Frankel, J.). At this trial also, Conforti testified to the "hospital delivery." Although stating that he had made a "mistake" at the Mallah trial and that the delivery was one, not one and half kilos of heroin (DT 715 - 716)*, he nevertheless stated that in April, 1972 he, along with Jack Spada, made the delivery to Samuel Kaplan. (DT 533 - 537) At this trial also, Conforti testified that there were "plenty of times" that he mixed heroin with Jack Spada in April of 1972. On cross-examination, Conforti testified with certainty that the delivery to Kaplan was in April of 1972. (DT 680; records reveal that Kaplan was at the Community Hospital in Brooklyn from April 23rd to May 5th, 1972, DT 682)

It was disclosed, however, that Jack Spada was in the Atlanta Federal Penitentiary until July 11th, 1972 when he was transferred to a halfway house in New York and ultimately released in September of 1972. (DT 725) In other words, Spada

*The letters "DT" make reference to the De Saverio transcript.

was in federal prison at the very time that Conforti alleged that he was mixing and delivering heroin.

Appellant contended in the court below that such an outright falsehood would have dealt a crushing blow to Conforti's already questionable credibility.

"You deponent submits that disclosure of such an absolute lie would have produced a 'significant chance' of acquittal. Without doubt, this newly discovered evidence, coupled together with impeachment materials of Cecile Mileto contained in Mallah's 2255 petition (76 Civ. 3298 [MP]) would bolster that chance of acquittal and, accordingly, a new trial is required." (New trial motion, Shargel affdvt., A 20)

STATUTES INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure states as follows:

"Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

Title 28, United States Code, Section 2255 states as follows:

"§2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion as from a final judgment on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

QUESTION PRESENTED

1. Whether it was error for the district court to deny appellant's Rule 33 motion without an evidentiary hearing?

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WITHOUT AN EVIDENTIARY HEARING IN VIEW OF THE SERIOUS ALLEGATION OF PERJURY BY A KEY PROSECUTION WITNESS.

As developed in the Statement of the Facts, the theory of the government's case was that Benjamin Mallah was the financier or money man behind Herbert Sperling, the core conspirator. No witness was more instrumental in helping the government sustain this position than Joseph Conforti. It was through Conforti that the government was able to introduce certain conversations, including narrative hearsay, which shaped the government's case. This included the one occasion where Conforti was alleged to have asked his mentor, Mileto, "who was that guy carrying the money" which had been obtained from the sale of heroin and Mileto was said to have replied,

"He is Ben Mallah." (T 655) Mileto had allegedly told Conforti earlier that "Benny" was Herbie's "partner for money." (T 653) Conforti, as noted earlier, also testified to meetings where Mallah was alleged to have been present.

When cross-examined about his attempt to extort money from Samuel Kaplan, who was once described as a co-conspirator at the Sperling trial, Conforti brought to light another alleged heroin transaction which formed the factual basis of his conversation with Kaplan. This purportedly involved conspirator Jack Spada who, along with Conforti, allegedly delivered heroin to Sam Kaplan while Kaplan was confined to a hospital. (T 779 - 780) Conforti testified to this "hospital delivery" under the same oath that produced his other testimony concerning Mallah's alleged involvement. The instant new trial motion was based on facts which disclosed that beyond doubt, Conforti's testimony with respect to the "hospital delivery" was patently false. It was disclosed at the later De Saverio trial that Spada was in federal prison during this entire time. (DT 725)

In denying the Rule 33 motion, Judge Pollack relied primarily upon a finding that:

"There is no reasonable likelihood that the supposed perjury would have affected the judgment of the jury or brought a different verdict. . ." (Opinion, A 33)

Appellant's position in the district court, however, was simply that if Conforti's testimony was false with respect to one

material fact, the jury could conclude that his entire testimony was false. Therefore, Judge Pollack's conclusion that it was "irrelevant" whether Spada was actually present at the "hospital delivery" because this testimony "did not implicate Mallah" (Opinion, A 38), is, it is respectfully submitted, not dispositive of the issue. In his final instructions to the jury, Judge Pollack stated:

"If you find that any witness has willfully testified falsely as to any fact material to the case that you are considering, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything." (T 1661)

Credibility, of course, is a key issue to be determined at trial and the use of false testimony, which would bear only on the witness' credibility, would still result in the relief requested. In Napue v. State of Illinois, 360 U.S. 264 (1959), it was stated that:

"The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such settled factors as the possible interests of the witness in testifying falsely that a defendant's life or liberty may depend."

See, also, Brady v. Maryland, 373 U.S. 83 (1963).

It is now settled that a conviction in a criminal

case may be set aside if the government, by design or carelessness, allows a false or misleading account to be presented to the jury and there is "any reasonable Likelihood" that the inaccuracy "could have affected the judgment of the jury."

United States v. Agurs, 96 S.Ct. 2392 (1976). In the instant case, the government had within its possession records which established that at the time of this heroin transaction, Jack Spada, one of the alleged key participants, was in federal prison. This was not simply the knowledge of "any government official," United States v. Morell, 524 F.2d 550 (2nd Cir., 1975), but rather constituted the knowledge of an "arm of the prosecution," Giglio v. United States, 405 U.S. 150 (1972).

Appellant respectfully submits that the district court erred in its application of the Agurs "reasonable likelihood" test by imposing too strict a standard. Appellant submits that even if the more stringent "significant chance" test is applied, United States v. Seijo, 514 F.2d 1357 (2nd Cir., 1975); United States v. Stofsky, 527 F.2d 237 (2nd Cir., 1975), a new trial should be granted. Conforti's testimony was a critical issue at the trial. With all due respect to this Court's opinion on direct appeal, Conforti, since extrinsic evidence of his false testimony was excluded on cross-examination,* was able to escape effective contradiction on the attempted extortion of Samuel Kaplan. If the defense were able to show

*United States v. Mallah, 503 F.2d at 976

that Spada was in prison at the very time Conforti placed him as an active conspirator, the jury may have been persuaded to acquit.

In his opinion, Judge Pollack also suggests that the motion for a new trial must fail because "no reason has been suggested, and none appears, why Mallah's attorney could not, in the exercise of reasonable diligence, have discovered that Jack Spada was in jail at the pertinent time." (Opinion, A 39) This conclusion is supported by the proposition that Mallah's counsel was the same attorney who represented Sam Kaplan, "one of the alleged participants in the transaction where Spada was mentioned" and thus, counsel could have discovered the true facts from his client Kaplan. This finding, it is submitted, is erroneous as it presupposes that there was a hospital delivery and that Sam Kaplan was, in fact, involved. The government at trial stated that Conforti's cross-examination was the first time that they knew of the hospital delivery. There is nothing in this record, other than Conforti's testimony, to suggest that it actually took place. Consequently, there is nothing to support a finding that if counsel had questioned his former client, the hard fact of Spada's imprisonment could have been discovered. Judge Pollack also stated that:

"Counsel made no request to either the prosecution or the federal Bureau of Prisons to provide information concerning Spada's whereabouts at the time of the alleged transaction." (Opinion, A 39)

Hearing of this transaction for the first time, there was absolutely nothing which would prompt counsel to focus his inquiry on the Federal Bureau of Prisons. Moreover, defense counsel in a criminal case can expect that if the government has either actual or constructive knowledge of a fact which contradicts their witness' testimony, those facts would be disclosed.

Furthermore, the extent of the government's knowledge and the opportunity for defense counsel to obtain this critical information are matters, it is submitted, which should have been properly aired at an evidentiary hearing. The Supreme Court recently examined the question of whether a claim of suppressed evidence of false testimony by a key government witness could be properly resolved without such a hearing. De Marco v. United States, 415 U.S. 449 (1974). The court concluded in De Marco that since, if true, the facts alleged in that case would, under the governing law, require reversal of the petitioner's conviction "[t]he issue should have been remanded for initial disposition in the District Court after an evidentiary hearing." 415 U.S. at 451 (emphasis added).

The particular need for such a hearing in a case such as this - a case which raises claims concerning the impact of withheld evidence on the jury's judgment and the knowledge of the government attorneys with respect to the potential impact of that withheld information - has been long recognized. E.g., United States v. Keogh, 391 F.2d 138, 149 (2nd Cir., 1968).

In Keogh, the court discussed at length the various factual possibilities which might be developed in an evidentiary hearing in order to demonstrate the possible effect which the withheld evidence could have had on the jury's deliberations and the possible motivation which could have lain behind the government's failure to disclose. Recognizing that an evidentiary hearing does not guarantee that the district court will actually know the true answers to these questions, the court nonetheless held that the district court "should have the benefit of evidentiary record" before making its decision as to whether the government committed error in suppressing the information in question. Id. Under these principles, there can be no doubt that the appellant Mallah was entitled to an evidentiary hearing in the district court on his motion.

Finally, Judge Pollack, in his opinion, concluded that the Rule 33 motion for a new trial was untimely since the mandate of this Court was issued on December 11th, 1976 and the instant new trial motion was filed more than two years later on January 10th, 1977. Judge Pollack relied on a decision of this Court which is more than 25 years old; Oddo v. United States, 171 F.2d 854, 858 (2nd Cir., 1949). Appellant submits that it is appropriate for this Court to reconsider this position and that reason would dictate that final judgment should be marked by action of the United States Supreme Court. United States v. Cody, 529 F.2d 564 (8th Cir., 1976). In any

event, appellant requested that the instant motion be treated as an application pursuant to Title 28, United States Code, Section 2255, which does not include similar time restraints.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court denying appellant's motion for a new trial should be reversed.

Respectfully submitted,

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